

**Sav-On Drugs, Inc. and Guild for Professional Pharmacists, Case 31-CA-11070**

May 28, 1982

**DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

Upon a charge filed on April 22, 1981, by Guild for Professional Pharmacists, herein called the Union, and duly served on Sav-On Drugs, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on May 7, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on February 11, 1981, following a Board election in Cases 31-RC-4134, 31-RC-4135, 31-RC-4136, 31-RC-4137, 31-RC-4138, 31-RC-4139, 31-RC-4140, 31-RC-4141, 31-RC-4219, 31-RC-4196,<sup>1</sup> and 31-RC-4187 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>2</sup> and that, commencing on or about April 9, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 18, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 31, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary

Judgment should not be granted. Respondent on August 21, 1981, filed a response to the Notice To Show Cause. On October 9, 1981, the General Counsel filed an erratum to the motion to transfer the case to the Board and for summary judgment, amending the last paragraph thereof to correct an inadvertent error.<sup>3</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

In its answer to the complaint and response to the Notice To Show Cause Respondent admits most of the operative factual allegations of the complaint, including the Union's certification and the request and refusal to bargain. Respondent denies, however, that the Union is a labor organization and that it has been at all times since February 11, 1981, the exclusive representative of all employees in the certified unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. As affirmative defenses, Respondent asserts that the pharmacy managers or head pharmacists are supervisors within the meaning of the Act; that, in reversing the Regional Director's decision and by ordering an election, the Board acted in excess of its statutory authority; and, further, that Respondent has been denied due process of law. Counsel for the General Counsel submits in effect that Respondent in its answer seeks to relitigate issues which were or could have been litigated in the prior representation proceeding; that Respondent does not offer to adduce any newly discovered or previously unavailable evidence, and does not allege the existence of any special circumstances which would require the Board to reexamine the decision made in the representation proceeding; that Respondent has admitted that the Union requested it to bargain and Respondent refused such request; and that no issues of fact remain to be litigated before the Board in the instant proceeding and summary judgment is therefore appropriate. We agree with the General Counsel.

Review of the record herein, including the record in Cases 31-RC-4134, *et al.*, reveals that following a hearing in said matter the Regional Direc-

<sup>1</sup> The Board's Decision on Review and Direction of Election in the underlying representation proceeding is reported at 243 NLRB 859 (1979).

<sup>2</sup> Official notice is taken of the record in the representation proceeding, Case 31-RC-4134, *et al.*, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

<sup>3</sup> While the General Counsel's erratum was not accompanied by statement of service on the other parties, this omission was subsequently corrected, and no response to the erratum has been filed with the Board. The Board has accepted the amendment.

tor issued a Decision and Order in which he found, *inter alia*, that the Union was not a labor organization within the meaning of the Act and dismissed the petition. The Board granted the Union's request for review of the Regional Director's Decision and Order and, on July 31, 1979, the Board issued its Decision on Review and Direction of Election, 243 NLRB 859, in which it found, *inter alia*, that the Union is a labor organization within the meaning of the Act, and that pharmacy managers were not supervisors as a class. The Board therefore directed an election in a unit composed of "all registered pharmacists employed by the Employer at its facilities located within the state of California, excluding all other employees, guards, and supervisors as defined in the Act," a unit which Respondent agreed was appropriate.<sup>4</sup> Following the Board's denials of various motions for reconsideration and intervention filed by Respondent and Intervenor Retail Clerks Locals, an election by secret ballot was conducted under the direction and supervision of the Regional Director. The Intervenor filed timely objections to conduct affecting the results of the election and, on February 27, 1980, the Regional Director issued a Supplemental Decision overruling Intervenor's objections, sustaining the challenges to certain voters, and overruling the challenges to others. Intervenor filed a request for review of the Supplemental Decision, which was denied by the Board on April 16, 1980. On January 8, 1981, the Regional Director issued a Second Supplemental Decision, in which he overruled the challenges to the ballots of 50 employees who the Board had found were discharged by Respondent in violation of Section 8(a)(3) of the Act.<sup>5</sup> Thereafter, following a second revised tally of ballots showing that, of approximately 469 eligible voters, 443 cast ballots, of which 12 were void, 230 were cast for the Union, 52 were cast for the Intervenor, 82 were cast against the participating labor organizations, and 5 remaining undetermined challenged ballots were not sufficient to affect the results of the election, the Regional Director on February 10, 1981, issued a Certification of Representative and, on February 11, issued a corrected Certification of Representative. Commencing on or about February 19, 1981, the Union has requested that Respondent bargain collectively with it as the exclusive collective-bargaining representative of the employees in the certified unit, and commencing on or about April 9, 1981, Respondent has refused to bargain collectively with the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or spe-

cial circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>6</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.<sup>7</sup> Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### 1. THE BUSINESS OF RESPONDENT

Respondent is a California corporation engaged in the retail sale of general merchandise and prescription drugs at numerous locations throughout the State of California with its principal office and place of business in Anaheim, California. Respondent in the course and conduct of its business operations annually derives gross revenues in excess of \$500,000 and annually purchases and receives goods and services valued in excess of \$50,000 directly from suppliers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

<sup>6</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

<sup>7</sup> We find Respondent's asserted "affirmative" defenses herein to be devoid of merit. With respect to Respondent's assertion that the Board acted beyond its statutory authority in granting the request for review and reversing the Regional Director, we note, *inter alia*, that the Regional Director's basis for dismissing the petition, i.e., that the Union was not a labor organization, was incorrect as a matter of law. Further, the Board's conclusion that the head pharmacists or pharmacy managers were not supervisors as a class, a finding based on a full record and premised in part on factors not alluded to in the Regional Director's decision (see 243 NLRB at 861, fn. 8), cannot be said to have denied Respondent due process of law. Indeed, Respondent was afforded ample due process, and availed itself of full opportunity, as revealed by the voluminous record in these proceedings, to raise and fully litigate the issues it now alleges preclude summary judgment.

<sup>4</sup> See *Sav-On Drugs, Inc.*, 243 NLRB 859.

<sup>5</sup> *Sav-On Drugs, Inc.*, 253 NLRB 816 (1980).

## II. THE LABOR ORGANIZATION INVOLVED

Guild for Professional Pharmacists is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *The Representation Proceeding*

#### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All registered pharmacists employed by Respondent at its facilities located within the State of California, excluding all other employees, guards, and supervisors as defined in the Act.

#### 2. The certification

On November 28, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on February 11, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about February 19, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 9, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 9, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. Respondent Sav-On Drugs, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Guild for Professional Pharmacists is a labor organization within the meaning of Section 2(5) of the Act.

3. All registered pharmacists employed by Respondent at its facilities located within the State of California, excluding all other employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 11, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collec-

tive bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 9, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sav-On Drugs, Inc., Anaheim, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Guild for Professional Pharmacists as the exclusive bargaining representative of its employees in the following appropriate unit:

All registered pharmacists employed by Respondent at its facilities located within the State of California, excluding all other employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at each of its California facilities where Pharmacists are employed copies of the attached

notice marked "Appendix."<sup>8</sup> Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>8</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Guild for Professional Pharmacists as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All registered pharmacists employed by us at our facilities located within the State of California, excluding all other employees, guards, and supervisors as defined in the act.

SAV-ON DRUGS, INC.